



MIKE HUNTER
ATTORNEY GENERAL

March 15, 2019

Geoffrey D. Long on Behalf of The Honorable Kevin Stitt
Governor of Oklahoma
PO Box 720186
Oklahoma City, OK 73172

Dear Mr. Long:

You have asked for my views regarding best practices to avoid ethical improprieties, or even the appearance of improprieties, in particular circumstances that may arise as you make the transition from the private sector to public service as the Governor of our state. I appreciate you reaching out to my office for counsel and commend you for taking proactive and transparent steps toward addressing these issues.

Your questions fall into two broad categories. The first set of questions involve issues relating to conflicts, or the appearance of conflicts, that may arise between your financial interests and your role as Governor. The second set of questions concern the payment of expenses relating to your transition from private life to public office, as well as your inauguration. This letter addresses the questions in that order.

I. Potential Conflicts

Before turning to your specific questions, I would note that my office has reviewed a draft proposal called the Kevin Stitt and Stitt Family Separation Plan. Based upon our review, the terms of that proposal set a prudent course for avoiding conflicts of interest that may arise between your private financial interests and your powers and duties as Governor. Relinquishing management and control of Gateway Mortgage Group and the Stitt Family Trusts comports with sound practice and ensures that your focus on the State's business is not distracted by private business interests. My office sees no further measures necessary to separate yourself, as Governor, from ownership and/or control of your personal and familial financial interests.

With regard to your specific questions that raise potential conflict of interest issues, the relevant standards are set forth in Ethics Rule 4. The purpose of Rule 4 is to "establish rules of ethical conduct relating to conflicts of interest for state officers and employees by prohibiting conflicts between their

public duties and private economic interests.” 74 O.S.Supp.2018, Ch. 62, App. 1, R. 4.1. Of particular note, Rule 4.4 prohibits a state officer from using “his or her State office [] for his or her own private gain” or “for the private gain of a family member or persons with whom the state officer or employee is affiliated in a nongovernmental capacity.” Meanwhile, Rule 4.7 generally prohibits a state officer from participating in (i) a matter that the officer “knows is likely to have a direct and predictable effect on [his or her] material financial interests,” (ii) a matter that involves as a party or a party’s representative a person with whom the state officer has a business relationship, and the officer is aware of that involvement, or (iii) a matter in which the officer determines that his or her impartiality may be reasonably questioned. Finally, Rule 4.21 generally permits the Governor and his employees to “engag[e] in activities inherent in representing constituents, gathering information or advocating policy positions.”

With these standards in mind, your specific questions are addressed below.

Appointment of Members of the Banking Board

From your request, it is my understanding that you have a material financial interest in an entity that is scheduled to merge with an Oklahoma bank, with the merger likely to close in the first quarter of this year. It is also my understanding that the Oklahoma Banking Department has approved the merger and the charter application of the resulting entity, and entered into an agreement with the Federal Deposit Insurance Corporation (FDIC) such that the FDIC will lead all future examinations of the resulting entity during your term of office.

You first ask whether you may, consistent with ethical requirements, exercise your duties as Governor under 6 O.S. § 202 to appoint members of the Banking Board. This action implicates the recusal directives of Ethics Rule 4.7 discussed above, but that Rule has two relevant exceptions: a state officer may participate in a matter from which he or she would otherwise have to be recused if the matter is (1) an action required by law, or (2) an action where the potential financial benefit “applies equally to all members of a profession, occupation or large class.”

Both exceptions are applicable here. First, the Governor is required by law to appoint the members of the Banking Board: “[m]embers of the Board . . . shall be appointed by the Governor[.]” 6 O.S. § 202(C) (emphasis added). The term “shall” generally “signifies a mandatory directive or command.” *Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882, 888. Second, while the duty to appoint members of the Banking Board may, in some sense, implicate your financial interest in the entity resulting from the above-described merger, any effect is likely to “appl[y] equally to all members” of the banking community. Accordingly, your appointment of members to the Banking Board—by itself—does not raise conflict of interest concerns under Rule 4.7.

More broadly, appointments to the Banking Board raise few conflict of interest concerns in these circumstances because there are meaningful checks and balances built into the appointment process. First, the Governor does not have unfettered discretion to choose his appointees. Except for the Commissioner (who can only vote to break a tie) and the non-banking-industry member, *see* 6 O.S. § 202(B), “appointments to the [seven-member] Board . . . shall only be made of individuals whose names shall be included in a list of twelve names submitted to the Governor by the Executive Committee of the Oklahoma Association of State Banks[.]” *Id.* § 202(C). Second, members of the Board, including the Commissioner, may be appointed only “with the advice and consent of the Senate.” *Id.* Third, Board members serve six-year terms and can be removed only for cause after notice

and hearing, *id.*, so a Governor is unable to quickly appoint a controlling number on the Board or unduly influence its members. Finally, if a Board member truly cannot be impartial on a particular official matter because it directly implicates the financial interests of the Governor who appointed the member (or the financial interests of the Governor's immediate family), the Board member may recuse from the particular matter under Rule 4.7. That Rule, however, does not require complete abdication of the appointment power by the Governor.

Communications with the Oklahoma Banking Department and other State Agencies

You also ask about interaction between the Governor and his staff and the Banking Department and its Board, which could include advocacy on issues that come before the Department. As a general matter, Ethics Rule 4.21 broadly permits the Governor and his staff to "advocat[e] policy positions," and Rule 4.7 permits the Governor to participate in matters that benefit him if they equally affect "all members of a profession, occupation or large class." Thus, as a general matter, Ethics Rule 4 does not prohibit or place limitations on all interactions between the Banking Department and the Governor and his staff. It should be noted that laws promoting public transparency, such as the Open Records Act, may be applicable to documents created in the course of such interaction.

Particular concerns arise with communications by either the Governor or his staff to the Banking Department or any other State agency that do not relate broadly to all members of a particular industry or profession, but instead relate only to business entities in which the Governor or his immediate family has a direct financial interest. The prudent course is for the Governor and his staff to refrain from communicating with agencies on such matters. This avoids not only the appearance of impropriety, but also any potential restrictions in Rule 4.4 on the use of public office for private gain.

The Governor's Role in the Legislative Process

Finally, you ask several questions regarding the Governor's role in the legislative process, including policy advocacy with members of the legislature and signing or vetoing legislation. For legislation that relates to a whole "profession, occupation, or large class," the above analysis regarding the exception to Rule 4.7 applies and the Governor and his staff would not be prohibited from signing, vetoing, or advocating for or against such legislation. This is the case even if his personal financial interests would stand to benefit along with the members of the "profession, occupation, or large class." Indeed, failure of the Governor to consider legislation presented before him may result in the bill becoming, or not becoming law, simply through inaction. *See* OKLA. CONST. art. VI, § 11. And bills that affect only businesses in which the Governor or his immediate family has a financial interest—and no other business—are unlikely to comport with the Oklahoma Constitution's prohibitions on special laws and the granting of exclusive privileges to specific associations, corporations, or individuals. *See, e.g.,* OKLA. CONST. art. V, §§ 51, 59. If the Governor is presented with legislation that violates such constitutional strictures, he should veto the legislation pursuant to his duty to uphold the State's Constitution. *See* OKLA. CONST. art. VI, § 11 & art. XV, § 1.

II. Payment of Expenses

Your questions regarding payment of expenses relate to your transition from private life to public office, as well as your inauguration as Governor. Based on your request, it is my understanding that the Oklahoma Turnaround Fund ("OTF") was organized as a social welfare organization under Internal Revenue Code § 501(c)(4) for the purpose of soliciting and collecting private donations from

individuals and corporate and political committee entities (but not from foreign entities) to fund various inaugural events and transition expenses. OTF does not accept any funding from the State of Oklahoma, or from any federal, state, or local government entity and is not managed using state funds, property, or resources.

Your questions center around three general topics:

1. Restrictions on the use of public funds provided for under 62 O.S. § 34.45;
2. Restrictions on the solicitation and use of private funds held by OTF; and
3. Whether OTF is subject to the Oklahoma Open Meeting Act, 25 O.S. §§ 301–314, and the Oklahoma Open Records Act, 51 O.S. §§ 24A.1–24A.30.

Pursuant to Oklahoma’s Constitution and state statute, the Governor-elect is sworn into office and assumes the duties of Governor on the second Monday of January following the election—in this case, January 14, 2019. OKLA. CONST., Art. VI, § 4(A); 51 O.S.2011, § 1. During the transition period between the Governor’s election in November and assumption of office the following January, the Governor-elect begins to assemble an administrative team and formulate his or her policy and budget goals. Oklahoma law contemplates this period of transition by authorizing the Office of Management and Enterprise Services (“OMES”) “to provide the Governor-elect . . . with such reasonable and necessary services as the Governor-elect . . . may request in the performance of [his or her] duties prior to taking office and in preparation for assuming the duties of office.” 62 O.S. § 34.45. Section 34.45 also authorizes OMES to allocate up to \$30,000 of its appropriated funds for use by the Governor-elect “for expenses of personal services, office expense, supplies, materials, travel and other necessary expenses incurred by such Governor-elect . . . in the performance of his or her duties prior to taking office and in preparation for assuming the duties of office.” *Id.*¹

Restrictions on the use of public funds provided for under 62 O.S. § 34.45

You inquire as to any restrictions on the use of the public funds provided for under 62. O.S. § 34.45 (the “Section 34.45 Funds”). The plain language of the statute provides the restriction—Section 34.45 Funds are limited to those “*necessary* for use by the Governor-elect . . . for expenses of personal services, office expense, supplies, materials, travel and other necessary expenses incurred by such Governor-elect . . . in the performance of his or her duties prior to taking office and in preparation for assuming the duties of office.” *Id.* (emphasis added). “Necessary,” given its plain and ordinary meaning,² refers to those expenses that are for “items . . . that cannot be done without; things that must be had.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1510 (3d ed. 2002). Accordingly, items which are necessary for the Governor-elect’s performance of duties or which prepare him to assume the role of Governor would be eligible for payment with Section 34.45 Funds. On the other hand, items which may be related to the Governor-elect’s performance of duties or his

¹ While not relevant to the questions posed, Section 34.45 provides for similar support of the Lieutenant Governor-elect during his or her transition to office, except the funds available for the Lieutenant Governor are capped at \$10,000. These funds are not available to an incumbent Governor or Lieutenant Governor. *Id.*

² See 25 O.S. § 1 (“Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears[.]”)

assumption of office but which are not necessary for such performance would not be appropriate for payment with Section 34.45 Funds.

Restrictions on the solicitation and use of private funds held by OTF

You also ask whether private funds held by the OTF may be used for (1) inaugural activities or (2) expenses incurred by the Governor-elect in his transition to office and preparation for assuming his duties as Governor.

The answer to your question on the use of private funds to pay for inaugural activities is found in Ethics Rule 2.119, which governs the solicitation of monetary or in-kind contributions “for an event such as an inaugural event associated with the officer’s office[.]” Rule 2.119 requires that an elected state officer create a special committee to solicit and receive contributions. The special committee must register with the Ethics Commission and submit to the Commission within 180 days after the event is held a report of contributions received and expenditures made. *Id.* Anyone not otherwise prohibited by law may contribute any amount to the special committee, including individuals, partnerships, limited liability companies, corporations, and labor unions. *Id.*

Regarding the second question, I am not aware of a state law prohibiting private funds from being used to pay for a private citizen’s preparation to assume public office. To the extent such private funds are solicited by a charitable organization, the charitable organization’s solicitations in Oklahoma may be subject to the Oklahoma Solicitation of Charitable Contributions Act, 18 O.S. § 552.1 et seq., specifically Section 552.3 requiring registration with the Oklahoma Secretary of State and certain information reporting. Other federal and ethics laws outside the scope of this letter may also apply.

Potential application of the Oklahoma Open Meetings Act, 25 O.S. §§ 301–314, and the Oklahoma Open Records Act, 51 O.S. §§ 24A.1–24A.30, to OTF

Your final question involves the application of either the Oklahoma Open Meeting Act, 25 O.S. §§ 301–314, or the Oklahoma Open Records Act, 51 O.S. §§ 24A.1–24A.30 to a private entity like OTF. These statutes apply only to certain private entities that receive or expend public funds, or administer public property. According to your letter, OTF does not engage in any such activities, so the statutes would not apply. This remains true even if the members of the private entity discussed inaugural activities and/or transition events.

Sincerely,



Mike Hunter
Oklahoma Attorney General